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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1987

BENJAMIN OKWUMABUA and
AFRO-LECON, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(14196)

QUESTIONS PRESENTED

1. Whether the Fifth Amendment was violated by deliberate and deceptive agency misconduct?

2. Whether statements procured from Petitioner Okwumabua during an ostensible civil audit interview are inadmissible under this Court's decision in *United States v. Kordel*, 397 U.S. 1.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 828 F.2d 950 and is reprinted in the Appendix, infra, at page A-1 et seq.

JURISDICTION

The Petitioners were charged in an indictment, filed in the Western District of New York, with six counts of making false statements to the Small Business Administration in violation of 18 U.S.C. §1001, one count of filing a false claim in violation of 18 U.S.C. §287, and one count of mail fraud in violation of 18 U.S.C. §1341.

The Petitioners moved to suppress documentary items and statements which had been made by Petitioner Okwumabua. After an evidentiary hearing the District Court suppressed statements made by Petitioner Okwumabua on June 6, 1985. The other aspects of the suppression motion were denied. The District Court order is reprinted in its entirety in the Appendix, infra, at Page A-14 et. seq.

On January 27, 1987 the government appealed from that portion of the order which suppressed Petitioner Okwumabua's statements of June 6, 1985.

The United States Court of Appeals for the Second Circuit reversed the suppression portion of the order on September 11, 1987. The Second Circuit opinion is reprinted in the Appendix, infra, at page A-1. On October 22, 1987, the Second Circuit denied the Petitioners' application for re-hearing en banc. That order is reprinted in the Appendix, infra at page A-10.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, which states that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law nor shall private property be taken for public use, without just compensation."

In The

Supreme Court of the United States

OCTOBER TERM, 1987

BENJAMIN OKWUMABUA and
AFRO-LECON, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

The Petitioners were accused in an eight count indictment filed on January 28, 1986.[1][2]. They were accused of making false statements to the United States Small Business Administration ("SBA"), one count of filing a false claim with the General Services Administration ("GSA") and one count of mail fraud.

[1] [ ] refers to pages of Appendix filed with the United States Court of Appeals for the Second Circuit.

This case arose from a contract between the corporate Petitioner and the "SBA." Afro-Lecon was awarded a "multi-million dollar" contract for the production of filing cabinets for the GSA. The Petitioner Okwumabua was and is the President of Afro-Lecon, Inc.

The contract was unilaterally "terminated for the convenience of the Government." 5-20, p. 15.[2] A contract provision authorized Afro-Lecon to submit a claim for "[a]ll costs" incurred in connection with the project. 5-20, pp. 15-16.

In October, 1983 Afro-Lecon made claims submissions which sought over $1 million. Those claim submissions had been prepared with the assistance of legal counsel. 9-16, pp. 32-33.

By December, 1984 the GSA had denied the claim of Afro-Lecon and its attorneys had initiated administrative litigation before the GSA's Contract Board of Appeals. 5-20, pp. 16-17 9-16, pp. 8-9. Due to Afro-Lecon's Claim submissions and its initiation of administrative litigation, the GSA exercised its right under the contract to audit the claim 5-20, pp. 6, 14-15 5-21, pp. 29, 159. The Petitioners were continuously represented by legal counsel at all times pertinent to this petition.

The administrative litigation could not be concluded during the pendency of the audit. 5-20, pp. 35-36 9-16, pp. 11-12, 17-19. Petitioner Okwumabua and legal counsel spoke often about the administrative litigation. 9-16, p. 53. It was decidedly in the interest of Afro-Lecon for the audit to be concluded so the litigation could proceed to resolution. 9-16, pp. 18, 21-22.

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[2] Testimonial references recite the date and applicable page(s) of the Suppression hearing transcripts.

In furtherance of the administrative litigation, counsel for both sides served interrogatories and requests for the production of documents. 9-16, pp. 10-11. At some time during Fall, 1984 counsel for the Petitioners was told that the GSA would conduct an audit. 9-16, p. 11.

Counsel for both parties to the administrative litigation discussed the location where audit activities were to occur. 9-16, p. 12. Before the audit began, Petitioner Okwumabua sought and received the advice of legal counsel. Counsel gave specific and repeated instruction as to what should be done during the audit. 9-16, pp. 12-13. For example, Petitioner Okwumabua was instructed by legal counsel to restrict the auditor to one room. 9-16, pp. 12-13, 39-40.

The audit began in January, 1985 at Afro-Lecon's office in Jamestown, New York. The audit was conducted by George Pavel of the GSA Inspector General's Office. 5-20, p 4. Auditor Pavel knew of the pending administrative litigation and of the involvement of counsel before he began the audit. 5-20, pp 18-19.

During January, 1985 Auditor Pavel asked Petitioner Okwumabua for Afro-Lecon's financial statements. 5-20. pp. 23-30. After Pavel spoke to the company's legal counsel he was given access to the financial statements. 5-20, p. 25. Pavel knew that Petitioner Okwumabua sought legal advice concerning the information to be disclosed during the audit. 5-20, pp. 31-32.

Auditor Pavel sought the supporting records for the labor cost summaries which had been furnished to him. 5-20, pp. 38-40. He made that request before returning to his New York City office. 5-20, p. 39.

On June 3, 1985 Pavel resumed his audit activities at Afro-Lecon's Jamestown office. After being shown labor cost summaries which purportedly differed from the earlier summaries,

Pavel contacted his audit supervisor Mr. Emara. This contact was on either June 4 or 5, 1985. Significantly, during a June 4, 1985 telephone conversation with Afro-Lecon's attorney, Pavel stated that "everything was fine." 9-16, p. 20.

At some time prior to June 6, 1985, after speaking to GSA audit personnel, Special Agent Garrett Howard opened a criminal file on the Petitioners. 5-21, pp. 76-78, 82. On June 5, 1985 auditor Pavel was told that Supervisor Emara and Special Agent Howard would be coming to Afro-Lecon the next day to investigate further. 5-20, p. 52. Pavel told Petitioner Okwumabua that his boss was "coming down with another member of the Office of Inspector General." 5-20, p. 53.

On June 5, 1985 Special Agent Howard telephoned the office of the United States Attorney for the Western District of New York. 5-21, pp. 109-119. He spoke to Assistant United States Attorney Kathleen Mehltretter. Agent Howard said that he would interview Petitioner Okwumabua, the President of Afro-Lecon. 5-21, p. 111. Howard testified that he was told that no *Miranda* warnings were necessary and that he should not be deceptive with respect to his identification.

The sole purpose for Special Agent Howard's involvement was to pursue a criminal investigation of the Petitioners. 5-21, pp. 89-91. On June 6, 1985, after they arrived in Jamestown, Supervisor Emara and Special Agent Howard met auditor Pavel. They "decided" that Howard would be passed off as just another member of the Inspector General's office. 5-21, p. 93. Howard wanted to conceal his actual purpose because otherwise, Petitioner Okwumabua would not speak to him. 5-21, p. 92. Auditor Pavel admitted that he did not want Petitioner Okwumabua to know what Special Agent Howard was doing. 5-20, pp. 105-106.

Upon arrival at Afro-Lecon, auditor Pavel introduced Howard as a member of the Inspector General's office. 5-20, p. 68.

Pavel added that "he will be working with us here." id. Pavel also testified that he further described Howard's role as follows:

> "[h]e was going to work with us. I don't know if I said he's going to be working with us for a week or two. He's here today to work with us." [29]

Immediately thereafter, Special Agent Howard conducted a one hour interview of Petitioner Okwumabua. No *Miranda* warnings were administered. 5-21, pp. 65-66. Petitioner Okwumabua was questioned about the labor summaries provided to Pavel in June, 1985. 5-21, pp. 106-107.

At the suppression hearing, auditor Pavel testified that Petitioner Okwumabua was given the impression that Special Agent Howard was "just another person there to work on the claim." [28]

On June 7, 1985, Howard, Emara and Pavel met with Ms. Mehltretter at the United States Attorney's office in Buffalo. She suggested that Pavel continue his audit activities and he did. In July, 1985 Pavel was directed to cease audit activities and assist Howard. Thereafter, several grand jury subpoenas were issued.

When Afro-Lecon's attorneys first learned that a criminal investigation was underway, they sought a stay of the administrative litigation. 9-16, pp. 24-26, 28-30.

After indictment the Petitioners moved to suppress documents and statements made by Petitioner Okwumabua in January and June 1985. Except for Petitioner Okwumabua's statements of June 6, 1985 the district court denied the suppression motion. This appeal ensued from that portion of the district court order which suppressed Petitioner Okwumabua's statements to Special Agent Howard on June 6, 1985.

REASONS FOR GRANTING THE WRIT

In *United States v. Kordel*, 397 U.S. 1, 90 S. Ct. 763 (1970) this Court was confronted with Fifth Amendment issues which arose from "simultaneous civil and criminal proceedings." 397 U.S. at 23; 90 S. Ct. at 764-765. The *Kordel* Court expressly observed that such dual investigations are subject both to due process scrutiny and the Court's supervisory role in the administration of criminal justice. 397 U.S. at 11-13; 90 S. Ct. at 769-770. Moreover, this Court expressly recognized that,

> "the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering a forfeiture of his property" 397 U.S. at 13; 90 S. Ct. at 770.

This case involves deliberate and premeditated agency deception that was designed to discourage Petitioner Okwumabua from either conferring with legal counsel or exercising his right to remain silent. Auditor Pavel's introduction and misleading statement of Special Agent Howard's role eliminated any motive that Petitioner Okwumabua would otherwise have had to make any inquiry. Petitioner Okwumabua was affirmatively and deliberately led to believe that Special Agent Howard was merely another auditor assigned to work on the claim. In fact, it was that false impression that the agents desired to create.

In addition, the agency deception exploited the inherently coercive effect of the audit itself. As was well known, the audit had to be concluded before expense reimbursement could be pursued in the administrative litigation. By passing Howard off as another auditor Petitioner Okwumabua was led to believe that Howard's questions were audit related and therefore inextricably linked to Afro-Lecon's being paid for the work it had performed.

It is respectfully submitted that the Second Circuit decision in this case cannot be reconciled with this Court's opinion in *Kor-*

del. Moreover, the complained of government conduct in *Kordel* does not approximate the outrageous misconduct in this case. For example, corporate counsel in the *Kordel* case was aware of the written interrogatories served by the Government. In fact, counsel submitted an affidavit in support of the Corporation's motion for a stay. 397 U.S. at 4; 90 S. Ct. at 765. This Court expressly observed that the respondents in *Kordel* could not argue that the interrogatory responses were made without benefit of counsel "or without appreciation of the possible consequences." 397 U.S. at 9-10; 90 S. Ct. at 768.

Here, Petitioner Okwumabua was victimized by deliberate and premediated agency deception. Given the close supervision of counsel throughout the prior stages of the audit, it is obvious that Petitioner Okwumabua would have been advised not to speak to Howard had the deception not occurred. Corporate counsel so testified at the suppression hearing. 9-16; pp. 30-31. When counsel did learn that a criminal investigation was being pursued a stay application was made. In a civil proceeding, such a stay application constitutes the assertion of the Fifth Amendment. *Mid-America Process Service v. Ellison*, 767 F.2d 684, 686 (10th Cir., 1985).

The Second Circuit erroneously misapplied a number of this Court's decisions. In all four of those decisions the defendant had been *Mirandized*. *Beckwith v. United States*, 425 U.S. 341, 343; 96 S. Ct. 1612, 1614-1615 (1976); *United States v. Washington*, 431 U.S. 181, 183-184, 97 S. Ct. 1814, 1817 (1977); *Moran v. Burbine*, ____U.S.____, 106 S. Ct. 1135, 1138 (1986); *Colorado v. Spring*, ____U.S.____, 107 S. Ct. 851, 853-854 (1987). In two of those decisions this Court reaffirmed the principle that deception can vitiate an otherwise valid waiver of one's right to remain silent. *Moran*, ____U.S.____, 106 S. Ct. at 1142; *Spring*, ____U.S.____, 107 S. Ct. at 858, note 8.

Certiorari review is needed so that the parameters of permissible agency conduct in parallel investigations can be established.

CONCLUSION

For these reasons, the Court should grant this petition for certiorari.

Respectfully submitted,

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Appendix

SECOND CIRCUIT OPINION

UNITED STATES of America,
Appellant,
v.
Benjamin OKWUMABUA and
Afro-Lecon, Inc.
Respondents.

No. 1105, Docket 87-1046.

United States Court of Appeals,
Second Circuit.

Argued May 5, 1987.
Decided Sept 11, 1987.

Before OAKES, NEWMAN, and PIERCE, Circuit Judges.

PIERCE, Circuit Judge:

Appellant, United States of America, appeals from a portion of an order entered on December 29, 1986, in the United States District Court for the Western District of New York, Eifvin, *Judge*, granting respondent Okwumabua's motion to suppress statements made by him on June 6, 1985 to a special agent of the General Services Administration ("GSA") Inspector General's Office. On January 28, 1986, defendant Benjamin Okwumabua and his corporation, defendant Afro-Lecon, Inc. ("Afro-Lecon"), were indicted for six counts of making false statements to the United States Small Business Administration ("SBA") in violation of 18 U.S.C. §1001, one count of filing a false claim with GSA in violation of 18 U.S.C. §287, and one count of mail fraud in violation of 18 U.S.C. §1341. Defendants moved to suppress statements and documents obtained from them. Hearings were held on those motions on May 20 and 21, and September 2 and 16, 1986. The district court denied the portions of the motion

seeking the suppression of documents and the suppression of statements made by the defendant Benjamin Okwumabua in January 1985, and on June 4 and 12, 1985. Statements made on June 6, 1985 to Special Agent Garrett Howard of the GSA Inspector General's Office were ordered suppressed. A notice of appeal was filed by the government on January 27, 1987.

The sole question on appeal is whether Benjamin Okwumabua's Fifth Amendment privilege against self-incrimination bars the admission of incriminating statements made in a non-custodial setting to a special agent of the United States. For the reasons set forth below we hold that under the circumstances of this case the Fifth Amendment privilege does not bar the admission of the statements in question, and we reverse.

BACKGROUND

This case arose from a contract between the corporate defendant, Afro-Lecon, located in Jamestown, New York, and the SBA. Afro-Lecon was awarded a "multi-million dollar" GSA contract for the production of filing cabinets, which was subsequently terminated by the government. A contract provision authorized Afro-Lecon to submit a claim for "[a]ll costs" incurred in connection with the project. In October 1983, Afro-Lecon submitted a final claim in excess of $1 million for its costs of performance through the termination date. By December 1984, the GSA had denied the claim and Afro-Lecon had appealed to the GSA's Contract Board of Appeals.

Due to Afro-Lecon's claim submissions and its initiation of administrative litigation, the GSA exercised its right under the contract to audit the claim. George Pavel, an auditor in the GSA Inspector General's Office, began the audit in January 1985 with an on-site visit to Afro-Lecon's office. One portion of the claim was a request for payment of direct labor costs of $984,000. During the audit, Pavel requested documentation to support this la-

bor costs claim. In January 1985, Pavel was given a set of 26 weekly payroll summaries which were all certified to the SBA as being costs incurred in connection with the GSA contract. Pavel reviewed the payroll summaries and copied information from them onto his audit workpapers. He was not satisfied with this support documentation and requested access to time records or other records that would validate the payroll summaries and the claim. However, no other records were made available in January 1985. At some point in January 1985 Pavel spoke with Lindsay Simmons, attorney for Afro-Lecon, regarding access to financial statements which was provided.

During May 1985, Pavel received a phone call from Okwumabua in reference to additional records that were available for his review. Pavel returned to Jamestown on June 3, 1985 and asked to see the payroll summaries again. He was provided with payroll summaries that were different from the summaries given to him in January. This second set, hereinafter referred to as the June set, were also certified to the SBA. Pavel did not confront anyone about the two sets of payroll summaries, but he requested and received a copy of the June set of records.

On June 4 or 5, Pavel reported to his supervisor, Sayed Emara, that he had received two different sets of records to support the direct labor costs claim. On June 5, Pavel was informed that his supervisor and Garrett Howard, a special agent of the Inspector General's Office, would be coming to Afro-Lecon to investigate further. Sometime prior to June 6, 1985, after talking to GSA audit personnel, Agent Howard opened a file to investigate the possibility that a criminal violation had occurred.

On June 5, 1985, Agent Howard telephoned the United States Attorney's Office in Buffalo and spoke with Assistant United States Attorney ("AUSA") Mehltretter about the Afro-Lecon investigation. He informed the AUSA that he would be in Buffalo on June 7 and arranged to meet with her on that date. During

their telephone conversation, Howard told the AUSA that he was going to be in Jamestown on June 6 to investigate the possibility of false statements in the claim submitted by Afro-Lecon on its GSA contract. In response to an inquiry by Howard, the AUSA told him that when he investigated the claim he was not required to give *Miranda* warnings but that he should not be deceptive with respect to his identification.

Howard, Pavel, and Emara met with Okwumabua for one hour on June 6, 1985, in Okwumabua's office. Howard was introduced as a member of the Inspector General's Office. He was not identified as a special agent nor was Okwumabua told that allegations of fraud or false statements were being investigated. No threats or promises were made to Okwumabua and he was not restrained, confined, or placed under arrest at any time. Because the interview was non-custodial in nature, *Miranda* warnings were not given. Howard interviewed Okwumabua regarding the June set of payroll summaries which had been provided to Pavel.

On June 7, 1985, Howard, Pavel, Emara, and AUSA Mehltretter met in the United States Attorney's Office in Buffalo. Howard and Pavel informed the AUSA of the nature of the claim and about the two sets of payroll summaries that had been given to Pavel. The AUSA requested that further investigation be conducted to determine what records the company might have from which labor costs could be determined. Interviews of the company's accountant and past employees were discussed. AUSA Mehltretter suggested that Pavel continue his audit by analyzing the workpapers that he has prepared. After the meeting of June 7, 1985, Pavel returned to Jamestown alone and continued his audit at Okwumabua's office. Agent Howard met with the AUSA on July 22, 1985. Shortly before this meeting, Pavel was instructed to discontinue his audit and to assist Howard. Thereafter, several grand jury subpoenas were issued.

On January 28, 1986, Okwumabua and Afro-Lecon were indicted for violations of 18 U.S.C.§§287, 1001, and 1341. Thereafter, defendants moved to suppress statements and documents obtained from them. The district court denied the portions of the motion seeking the suppression of documents and the suppression of statements made by Okwumabua in January 1985, and on June 4 and 12, 1985. However, the district court granted the motion with respect to the statements made by Okwumabua to Howard on June 6, 1985. In doing so, the district judge stated that "[t]his Court is not approbatory of the prosecution's utilization of the ploy of having a criminal investigator 'sit in' and participate in a non-criminal conference or interview when criminal prosecution was, as here, eminently predictable and without advising the 'target' of the investigator's role and purpose." We reverse.

DISCUSSION

[1,2] The government's sole contention on appeal is that the district court erred in suppressing statements made by the defendant Okwumabua to Agent Howard on June 6, 1985. In support of its position, the government asserts that there were no affirmative misrepresentations by the three agents and that Okwumabua's statements were voluntary. "When such a claim [of involuntariness] is raised, it is the duty of an appellate court . . . 'to examine the entire record and make an independent determination of the ultimate issue of voluntariness.' " *Beckwith v. United States*, 425 U.S. 341, 348, 96 S.Ct. 1612, 1617, 48 L.Ed.2d 1 (1976) (quoting *Davis v. North Carolina*, 384 U.S. 737, 741-42, 86 S.Ct. 1761, 1764, 16 L.Ed.2d 895 (1966)). We have previously stated that

> the test of voluntariness [of a confession] is whether an examination of all the circumstances discloses that the conduct of "law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions

> not freely self-determined. . . ." *Rogers v. Richmond*, 365 U.S. 534, 544, 81 S.Ct. 735, 741, 5 L.Ed.2d 760 (1961).

United States v. Mast, 735 F.2d 745, 749 (2d Cir.1984) (citations omitted). There are various factors to be considered in making a determination of voluntariness — they include the type and length of questioning, the defendant's physical and mental capabilities, and the government's method of interrogation. *Id.*

[3] After examining the totality of the circumstances, we conclude that the free will of the defendant was not overborne. *United States v. Washington*, 431 U.S. 181, 188, 97 S.Ct. 1814, 1819, 52 L.Ed.2d 238 (1977). The circumstances in this case do not disclose any overbearing conduct on the part of government agents. There is no evidence that any promises were made to Okwumabua or that he was subjected to any threats, physical coercion, or protracted interrogation. *See Mast*, 735 F.2d at 750. It is undisputed that the interview was non-custodial, and that it occurred at the defendant's place of business for approximately one hour.[1] At no time during the interview did he express a desire to contact his attorneys. Okwumabua has earned a doctorate degree in economics. He had retained and consulted with counsel with regard to the filing of the claim, the conducting of the audit, and the release of documents to the auditor.

[4] Defendants contend that Howard, Pavel, and Emara decided before the interview that Howard's role would be concealed and that Howard would be passed off as merely another auditor. To prevail on this point, a defendant must produce clear and convincing evidence that the agents affirmatively misled him as to the true nature of the investigation. *United States v. Serlin*, 707 F.2d 953, 956 (7th Cir. 1983) (citations omitted). The record

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1. Defendant concedes that the interview was non-custodial and therefore the *Miranda* warnings do not apply. Additionally, defendant concedes that the Sixth Amendment right to counsel had not attached.

does not support the assertion that Howard, Pavel, and Emara affirmatively attempted to mislead Okwumabua about the true nature of the investigation. "Simple failure to inform defendant that he was the subject of the investigation, or that the investigation was criminal in nature, does not amount to affirmative deceit unless defendant inquired about the nature of the investigation and the agents' failure to respond was intended to mislead." *Id.* (citations omitted). Silence by a government agent can only be equated with an affirmative misrepresentation where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading. *United States v. Pruden*, 424 F.2d 1021, 1032 (5th Cir.), *cert. denied*, 400 U.S. 831, 91 S.Ct. 62, 27 L.Ed.2d 62 (1970); *see also United States v. Olmstead*, 698 F.2d 224, 226 (4th Cir. 1983). None of these factors were present here. No inquiries were made by the defendant as to the identity of the agent or his purpose in conducting the interview.

In our view, there was no legal or moral duty to inform the defendant that Agent Howard was conducting a criminal investigation. The Supreme Court has held that "a valid waiver does not require that an individual be informed of all information 'useful' in making his decision or all information 'might . . . affec[t] his decision to confess.' '[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.' " *Colorado v. Spring*, ____U.S.____, 107 S.Ct. 851, 859, 93 L.Ed.2d 954 (1987) (quoting *Moran v. Burbine*, 475 U.S. 412, ____, 106 S.Ct. 1135, 1142, 89 L.Ed.2d 410 (1986)). The Court in *Spring* stated in conclusion that "a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." *Id.* Accordingly, in the instant case there was no duty to inform the defendant that allegations of fraud and false statements were being investigated.

Agent Howard had received a brief explanation of the claim and contract and of the auditor's concern that there were two different sets of documents allegedly supporting the same part of the claim. No grand jury investigation had begun and no decision had been made by the United States Attorney's Office whether or not to prosecute. The only contact between Agent Howard and AUSA Mehltretter prior to the interview with Okwumabua was a telephone conversation to arrange a later appointment to discuss the matter. Pavel and Howard violated no rights of the defendant by inquiring of Okwumabua as to what facts supported his claim.

Defendant Okwumabua argues that he would have exercised his Fifth Amendment right to remain silent had he not been victimized by agency deception. Similarly, in *United States v. Washington*, 431 U.S. 181, 190 n. 6, 97 S.Ct. 1814, 1820 n. 6, 52 L.Ed.2d 238 (1977), the defendant contended that it was fundamentally unfair to elicit incriminating testimony from a potential defendant without first informing him of his target status. It was argued that this would alert the witness more pointedly so as to enable him to decide whether to invoke the privilege against compelled self-incrimination. The Supreme Court rejected this due process argument in *Washington*, holding that there is no evidence of any governmental misconduct which undermined the fairness of the proceedings.

In our view, Okwumabua's "will was not overborne and his capacity for self-determination was not critically impaired by the agent's silence." *Olmstead*, 698 F.2d at 227 (4th Cir. 1983). The totality of the circumstances discloses that, despite the agent's silence about his identity, Okwumabua's statements were "the product of [his] essentially free and unconstrained choice. . . ." *See Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S.Ct. 1860, 1879, 6 L.Ed.2d 1037 (1961). Accordingly, we conclude that

Okwumabua's statements were made voluntarily and should not have been suppressed. The district court's order of suppression is reversed.

SECOND CIRCUIT ORDER

United States Court of Appeals
for the
Second Circuit

WDNY
86 CR 28
ELFVIN

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of September, one thousand nine hundred and eighty-seven.

Present: HON. JAMES L. OAKES,
HON. JON O. NEWMAN,
HON. LAWRENCE W. PIERCE,
Circuit Judges,

UNITED STATES OF AMERICA,
Appellant,
—v.—
BENJAMIN OKWUMABUA and
AFRO-LECON, INC.,
Respondents.

No. 87-1046

Appeal from the United States District Court for the Western District of New York

This cause came to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Order of said District Court be and it hereby is reversed in accordance with the opinion of this Court.

[Signature]
Elaine B. Goldsmith,
Clerk

[Signature]
Edward J. Guardaro,
Deputy Clerk

[Stamped: United States Court of Appeals/Filed Sept 11, 1987/
Elaine B. Goldsmith, Clerk/Second Circuit]
[Stamped: A True Copy/Elaine B. Goldsmith/Signature/Clerk]

SECOND CIRCUIT ORDER DENYING A RE-HEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-second day of October one thousand nine hundred and eighty-seven.

UNITED STATES OF AMERICA,
Appellant,
-v.-
BENJAMIN OKWUMABUA and
AFRO-LECON, INC.,
Appellees.

No. 87-1046

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellees Benjamin Okwumabua and Afro-Lecon, Inc.,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

[Signature]

Elaine B. Goldsmith,
Clerk

[Stamped: Received Oct 26 1987/United States Attorney]
[Stamped: United States Court of Appeals/Filed Oct 22 1987/
Elaine B. Goldsmith, Clerk/Second Circuit]

DISTRICT COURT ORDER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA	CR-86-28E
-vs-	
BENJAMIN OKWUMABUA and AFRO-LECON, INC.	ORDER

This Court is not approbatory of the prosecution's utilization of the ploy of having a criminal investigator "sit in" on and participate in a non-criminal conference or interview when criminal prosecution was, as here, eminently predictable and without advising the "target" of the investigator's role and purpose. On account of the government's doing so in this case, the abovenamed persons ("the defendants") (an individual and his corporation) ask that what was gained thereby be suppressed as evidence upon trial.

Such motion must be granted in part and denied in part.

The documentation secured via this mechanism is available to the prosecution upon trial because no unfair or undue prejudice will be worked upon the defendants. The existence of the documentation had been priorly known and summarized and would have become available to the prosecution in due course via a subpoena duces tecum.

On the other hand whatever was verbalized by the individual defendant may not be used as direct evidence on the trial, either as against the corporate defendant or the individual defendant. *United States* v. *Mast*, 735 F.2d 745, 749-750 (2d Cir. 1984). Suppression thereof is merited not only be equity and good conscience but also by the salutary aspect of impressing upon the prosecution that such overreaching is not compatible with even-

handed justice which, rather than achieving convictions, should be a prosecutor's goal. Accordingly, it is hereby

ORDERED that the defendant's motion to suppress is denied with the exception that statements made June 6, 1985 by defendant Okwumabua shall not be used as any part of the government's case-in-chief; and it is hereby further

ORDERED that the individual defendant and his attorney and the defendant corporation's attorney and the attorney for the government shall appear before Part II of this Court at 2:00 p.m. on the 26th day of January 1987 for the purpose of fixing a date for the commencement of the trial of this case.

Dated: Buffalo, N.Y.
December 26, 1986

[Signature]
U.S.D.J.

Supreme Court, U.S.
FILED
JAN 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1002

In the Supreme Court of the United States

OCTOBER TERM, 1987

BENJAMIN OKWUMABUA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

4 pp

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1002

BENJAMIN OKWUMABUA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred when it reversed an order of the district court suppressing as evidence statements petitioner Okwumabua had made to a federal agent.

On January 28, 1986, petitioners were charged in an eight-count indictment returned in the United States District Court for the Western District of New York. The indictment charged them with making false statements to the Small Business Administration, in violation of 18 U.S.C. 1001; filing a false claim with the General Services Administration, in violation of 18 U.S.C. (& Supp. IV) 287; and mail fraud, in violation of 18 U.S.C. 1341. Petitioners moved to suppress the statements that petitioner Okwumabua had made during an interview at his office. The interview had been conducted by three members of the General Services Administration (GSA) Inspector General's Office following an audit of a GSA contract. Petitioners also moved to suppress documents that the agents had obtained from petitioners during the audit.

On December 26, 1986, the district court granted the motion with respect to the statement made by petitioner Okwumabua. The court granted the motion on the ground that one of the agents who participated in the interview was a criminal investigator, and that he participated in the interview at a time when a criminal prosecution was predictable but did not inform Okwumabua of his role and purpose (Pet. App. A14-A15).

The court of appeals reversed (Pet. App. A1-A9). The court found that the agent had no duty to inform petitioner Okwumabua that he was conducting a criminal investigation. Accordingly, the court concluded, petitioner's Fifth Amendment right to remain silent had not been violated by deception on the part of the agent. Instead, the court of appeals held, petitioner's statements were the voluntary products of his free and unconstrained choice.

Petitioners contend (Pet. 6-8) that the statements obtained from Okwumabua during the GSA interview are inadmissible into evidence under *United States* v. *Kordel*, 397 U.S. 1 (1970), because of deliberate and deceptive conduct by the agents that violated his Fifth Amendment rights. Whatever the merits of petitioners' contention, it is not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to suppress. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their current claim to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1988

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